Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

BRIAN KEITH HARPER,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This court should grant certiorari to resolve a circuit split regarding, and to correct the Fifth Circuit's evisceration of, Federal Rule of Evidence 404(b). Under the Fifth Circuit rule a prior conviction is admissible simply because a defendant pleaded not guilty in a drug conspiracy case—which means it is *always* admissible. As four circuits have held, the Fifth Circuit's "automatic" admissibility rule is contrary to the Rule and results in unfair trials, as in this case, where the prior convictions constituted the bulk of the evidence against the defendant.

The question presented is:

Whether the Fifth Circuit's approach in interpreting the application of Rule 404(b) where extrinsic evidence is automatically deemed admissible due to intent being placed in issue by a plea of not guilty in a drug conspiracy case is erroneous.

PARTIES TO THE PROCEEDINGS

Petitioner is Brian K. Harper, defendant-appellant below.

Respondent is United States of America, plaintiff-appellee below.

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1. Unpublished Opinion of the Court of Appeals for the Fifth Circuit in United States v. Harper, 2010 WL 816836 (5th Cir., 3/09/10). Before Clement, Prado and Elrod, Circuit Judges.

2. Order denying petition for rehearing en banc, dated April 14, 2010.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Brian Keith Harper, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered an order on March 9, 2010, a copy of which is attached herewith. See United States v. Harper, 2010 WL 816836 (5th Cir., 3/09/10); petition for rehearing en banc denied April 14, 2010.

OPINION BELOW

The Court of Appeals for the Fifth Circuit entered its order affirming the judgment of the district court on March 9, 2010. A copy of the opinion, United States v. Harper, 2010 WL 826836 (5th Cir., 3/09/10), and the order denying the petition for rehearing en banc on April 14, 2010, are annexed in the appendix.

JURISDICTION

On March 9, 2010, the Court of Appeals for the Fifth Circuit entered its order ruling affirming the district court. Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Court by Title 28 U.S.C. § 1254.

APPLICABLE RULE OF EVIDENCE

Rule 404(b), Federal Rules of Evidence, reads: Other Crimes, Wrongs of Acts - Evidence of other

crimes, wrongs, or acts in not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accuse, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, or the general nature of any such evidence it intends to introduce at trial.

STATEMENT OF THE CASE

Nature of the Case

Brian Keith Harper appealed his conviction in the United States District Court for the Eastern District of Texas to the Fifth Circuit Court of Appeals. The petitioner had been sentenced in the trial court to 360 months imprisonment to be followed by ten years of supervised release.

Proceeding and Disposition in the trial court

On December 12, 2007, a United States grand jury in the Eastern District of Texas, Sherman, Division, returned a one-count superseding indictment charging the petitioner with a conspiracy to possess with the intent to distribute or distribution of five kilograms or more of cocaine, in

violation of 21 U.S.C. § 846, and 18 U.S.C. § 2. The petitioner pled not guilty, and a jury trial commenced on November 12, 2008. After a trial lasting four days, the jury returned its verdict of guilty. On February 3, 2009, the petitioner was sentenced to 360 months imprisonment followed by ten years of supervised release.

Proceeding and Disposition in the Fifth Circuit Court of Appeals

The petitioner filed a notice of appeal from the judgment or the district court, and on April 13, 2010, the Fifth Circuit Court of Appeals entered its revised opinion affirming the judgment of the district court. The petitioner filed a petition for rehearing with suggestion for rehearing en banc, and the appellate court entered its order on April 14, 2010, denying the petition.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

Relevant Facts

The government gave pretrial notice of the convictions, which it intended to admit into evidence pursuant to Rule 404(b):

> (1) On August 23, 1989, Defendant Harper was arrested for Possession of a Controlled Substance in Hennepin

County, MN. On October 24, 1989, the Defendant plead guilty in Hennepin County District Court in Minneapolis, MN in Cause Number CR-89-046312. On December 13, 1989,
the Defendant was sentenced to three (3) years probation. On June 5, 1991, the Defendant was discharged from probation.

(2) On January 19, 1990, Defendant Harper was arrested for Unlawful Possession of a Narcotic in Hennepin County, MN. On May 17, 1991, the Defendant pled guilty in Hennepin County District Court in Minneapolis, MN in Cause Number CR-90-005048 and was fined $300.

(3) On April 28, 1993, Defendant Harper
was arrested on drug distribution charges.
On July 27, 1993, the charges were reduced and the Defendant pled guilty to Possession of Crack Cocaine in Hennepin County District Court, Minneapolis, MN in Cause Number CR-93-031745. On September 9, 1993, the Defendant was sentenced to three (3) years probation and nine (9) months jail. On September 9, 1996, the

> Defendant was discharged from probation.

The 1989 offense was a deferred adjudication rather than a conviction. Harper, at *4.

The petitioner claimed that the convictions were inadmissible under Rule 404(b) because they were remote in time, were different offenses from those of the charged crime, and were prejudicial under Rule 403. (R., Vol. I, pages 5-7).

The court said that a defendant automatically puts his or her intent at issue by entering a not guilty plea in a conspiracy case. It considered the question of the remoteness of the prior offenses, but permitted the government to introduce the convictions under Rule 404(b) (R., Vol. I, page 10). The court limited the evidence to the judgment of each offense and the petitioner's stipulation as to the controlled substance in each. (R., Vol. I, page 17).

Once the evidence was introduced at trial, the court gave the following instruction to the jury:

> "Ladies and gentlemen, let me give you an instruction what you've just seen on government's exhibits 36, 37, and 38, which are judgments of conviction involving the defendant, Brian Keith Harper. I need to instruct you that this evidence is admitted for limited

purposes and you may only consider it for limited purposes. You may not consider a prior conviction in assisting you to determine whether or not you think the defendant, Brian Keith Harper, committed the offense for which he is on trial now. You have to determine from the facts that are presented to you here, and the evidence that is presented to you, whether or not you believe he committed the offense he's on trial for, which is conspiracy to possess with intent to distribute cocaine. So if you find from the evidence that's been presented to you, after you've heard everything - and you haven't heard everything yet - that he committed the offense that he's on trial for here, then you can consider these prior convictions for the purpose of determining whether or not you think he knowingly conspired to possess with intent to distribute cocaine or whether you think there was some mistake or accident involved here. So there are limited purposes for which you can consider prior convictions of a defendant, prior similar type offenses. It's been stipulated that all these prior convictions involve cocaine, but only for the limited purpose of determining whether or not you think he had the

> intent that's required to knowingly participate in a conspiracy to possess with the intent to distribute cocaine."

(R., Vol. VI, pages 623-24). The trial court also included a cautionary instruction in the final instructions to the jury. (R., Vol. 7, pages 704-705).

The evidence introduced at the petitioner's trial is summarized in the Fifth Circuit's revised opinion in Harper:

> "In November 2007, Drug Enforcement Administration (DEA) agents executed a search warrant at an apartment in Lewisville, Texas on suspicion that it was being used to store illegal narcotics. The search revealed several items associated with cocaine trafficking and led to the arrest of Codefendant Gerrardo Javier Platas-Rodriguez. Platas-Rodriguez agreed to cooperate with the investigation and helped the agents to recover fifty-seven bricks of cocaine, each weighing approximately one kilogram; $33,000 in cash; a money counter; freezer bags; and wrapping materials from the compartment. Platas-Rodriguez told the agents that he had been hired to maintain the apartment as a stash house by Guadalupe Antonio Barrera, a

friend in Mexico.

The agents decided to conduct a controlled purchase using fake cocaine. At the agents' request, Platas-Rodriguez contacted Barrera, who informed him that an individual, later identified as Codefendant Orlando Leal Martinez, would come from Mexico to represent Barrera in the sale of a quantity of cocaine. On November 30, 2007, Martinez instructed Platas-Rodriguez to come to his hotel room early the next morning to await Barrera's instructions for completing the sale.

The next morning, Platas-Rodriguez and Martinez met the purchaser, co-defendant, Frank Savage. Savage met briefly with Platas-Rodriguez and Martinez inside a restaurant before driving to a nearby hotel and checking in. Shortly afterwards, they all met in the hotel room with Savage having in his possession $898,590.00 to purchase the cocaine. The agents entered the room and arrests all three.

Soon after his arrest, Savage began cooperating with the investigation. He told the agents that the money had belonged to Harper and that he was supposed to take the drugs to Harper. After Savage agreed to try to contact

> Harper, the agents retrieved a cellular telephone that Harper had given to Savage. Harper soon called and asked Savage what was going on. Agent Don York, the lead case agent, recorded four brief conversations between Savage and Harper. During these conversations, Harper seemed to be concerned that something was amiss. On December 13, 2007, Harper was arrested in Memphis, Tennessee. During an interview, Agent asked Harper if he knew why the DEA agents were present. Harper responded that Savage was "putting [his] name out there about some dope that got hit. Harper admitted that he had previously sold marijuana and cocaine and this current source of cocaine was a Hispanic man named "Red.'"

Harper, at **1-2.

There was plenty of evidence that a drug deal occurred and that the members of the conspiracy intended to participate therein as described above. However, there was scant evidence that Harper was a member of the conspiracy or did any acts in furtherance of the conspiracy. That was the issue in this case—not intent. The only evidence that was Harper was a member of the conspiracy were the bald, self-serving assertions of drug-dealers caught in the act who wanted desperately to help the

government convict other people so that they could obtain sentencing mitigation. The only evidence outside of this were phone calls alleged to have been made to Harper in which Harper made no incriminating statements. At trial, the petitioner did not contest the element of intent to enter into a conspiracy, but rather he explicitly denied that he was a part of any conspiracy. During opening statement, petitioner's counsel said that the petitioner "never expected for his friend of many years [Frank Savage] to betray him and lie." Savage "savage[d]" the petitioner by telling the government agent that the petitioner set up the drug deal. Counsel characterized the situation as "drugs, deception, and deals." (R., Vol. II, pages 224-25). The petitioner denied being present with the co-conspirators during the time of their drug activity, since he was with his friend Tim Mosby in the fall of 2007. When Savage was caught "red-handed" on December 1, 2007, "he turned on Brian [Harper]." (R., Vol. II, page 229). Counsel vigorously questioned Agent York's ability to recognize the petitioner's voice on a telephone call from Savage to the petitioner. (R., Vol. II, page 230). The testimony of the co-conspirators, Frank Savage and Gerrardo Platas, was suspect because of the plea bargains they made with the government. (R., Vol. II, page 231). In his closing argument, petitioner's counsel said that "[w]hat we have here is a case with a lack of evidence, a case without any substance, a case that has reasonable doubt woven throughout it, as the judge tells you in his jury instructions." (R., Vol.

IV, pages 742-744, 747) Emphasizing the propensity aspect of Rule 404(b), the prosecutor said in closing argument that it was the petitioner who had "not one, not two, but three prior convictions...," and "[i]t's not Frank Savage who has three prior convictions, it's not Gerrardo Platas who has three prior convictions..." (R., Vol. IV, pages 738-739).

The Fifth Circuit applied the two-pronged test in United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), to the admissibility of evidence under Rule 404(b):

> "This court permits the introduction of extrinsic evidence to prove criminal intent when a defendant enters a plea of not guilty, thereby requiring the government to prove the elements of its case. [United States v.] McCall, 553 F.3d 821, 827 (5th Cir. 2008)]. The crime to which Harper was charged, conspiracy to possess cocaine with the intent to distribute, required the government to prove that Harper had the intent to join the conspiracy... United States v. Garcia Mendoza, 587 F.3d 682, 689 (5th Cir. 2009). Evidence of Harper's past drug transactions is relevant to establish his criminal intent. Id. Therefore, the evidence of Harper's prior offenses satisfied the first requirement under Beechum."

Harper, at *3.

The court then considered Beechum's prejudice test:

> "The second prong of the Beechum test requires that the evidence meet the general requirements of Rule 403 and that its probative value not be substantially outweighed by its unduly prejudicial effect. This court has "consistently ... held that evidence of a defendant's prior conviction for a similar crime is more probative than prejudicial and that any prejudicial effect may be minimized by a proper jury instruction." United States v. Taylor, 210 F.3d 311, 318 (5th Cir. 2000). The record in this case reveals that the district court took great care to mitigate the prejudicial effect of the prior offenses. The district court limited the evidence to the judgment from each offense and Harper's stipulation as to the narcotic involved in each case. When the government introduced the evidence, the district court provided a detailed instruction to the jury as to the limited purposes for which the prior offenses were admitted. In its final instructions to the jury, the district court also gave the instruction regarding Rule 404(b) evidence found in

> the pattern jury instructions for the Fifth Circuit. See Fifth Circuit Pattern Jury Instructions (Criminal Cases) § 1.30 (West 2001). In light of our precedent and the district court's efforts to mitigate the prejudicial effect of the prior offenses, the district court did not abuse its discretion in admitting the extrinsic evidence. See Garcia Mendoza, 587 F.3d at 689."

Harper, at *3.

The court pretermitted any discussion about the petitioner's specific claims in his brief of prejudice by quoting United States v. Taylor, supra, 210 F.3d at 218, which says that the Fifth Circuit has "consistently ... held that evidence of a defendant's prior conviction for a similar crime is more probative than prejudicial and that any prejudicial effect may be minimized by a property jury instruction." See also United States v. Harris, 932 F.2d 1529, 1534 (5th Cir. 1991). The court then spoke of the "great care" with which the district court used to "mitigate the prejudicial effect of the prior convictions." The court held that "[i]n light of our precedent and the district court's efforts to mitigate the prejudicial effect of the prior offenses, the district court did not abuse its discretion in admitting the extrinsic evidence." Harper, at *3.

Argument

The petitioner was charged with a conspiracy to possess with the intent to distribute and distribute cocaine. The Fifth Circuit held that three prior possession convictions were properly admitted under Rule 404(b) on the issue of intent to enter the conspiracy. See United States v. Garcia Mendoza, 587 F.3d 682, 689 (5th Cir. 2009). In United States v. Roberts, 619 F.2d 379 (5th Cir. 1980), the court said that proof of entry into a conspiracy is often difficult to prove. The court held:

In every conspiracy case, therefore, a not guilty plea renders the defendant's intent a material issue and imposes a difficult burden on the government. Evidence of such extrinsic offenses as may be probative of defendant's state of mind is admissible unless he "affirmatively take(s) the issue of intent out of the case..."

Roberts, 619 F.2d 379. See also United States v. Buchanan, 70 F.3d 818, 832 n.15 (5th Cir. 1996) ["We have previously held that in conspiracy cases 'the mere entry of a not guilty plea sufficiently raises the issue of intent to justify the admissibility of extrinsic offense evidence.' United States v. Prati, 861 F.2d 82, 86 (5th Cir. 1988)."

In balancing the probative value of the evidence against the potential prejudice of the Rule 404(b), as required by United States v. Beechum, supra, the analysis was substantially undercut by the court's quote from United States v. Taylor,

supra, 210 F.3d at 318. See also United States v. Harris, 932 F.2d 1529, 1534 (5th Cir. 1991). Harper noted the "great care" which the court took to mitigate the prejudice from the prior convictions by giving a limiting instruction. Harper, at *3.

Other circuits have rejected the Fifth Circuit's view that any prejudice to the defendant from the admission of Rule 404(b) evidence may effectively be eradicated by a limiting instruction. United States v. Haywood, 280 F.3d 715, 724 (6th Cir. 2002), said:

> "... [T]he admission of this prejudicial evidence was not remedied by the district court's instruction to the jury that the evidence could be considered only as it related to Haywood's intent... A limiting instruction will minimize to some degree the prejudicial nature of evidence of other criminal acts; it is not, however, a sure-fire panacea for the prejudice resulting from the needless admission of such evidence. United States v. Garcia-Rosa, 876 F.2d 209, 222 (1st Cir. 1989), judgment vacated in part sub. nom. by Rivera-Feliciano v. United States, 498 U.S. 954, 111 S.Ct. 377 ... (1990) (holding that the prejudicial effect of the evidence of the defendant's other criminal acts was so severe that is could not "be remedied merely through a limiting instruction"

> and further stating that "[i]f limiting instructions could remedy all such errors, the government would easily be able to circumvent Rules 404(b) and 403")."

Haywood, 280 F.3d at 724.

This petition for writ of certiorari presents important issues for the proper application of Rule 404(b), and several treatises have addressed the conflicts both in the federal and state courts. In United States v. McCall, 553 F.3d 821 (5th Cir. 2008), the defendant was charged with distribution of cocaine, thus requiring the government to prove that the defendant formed a general intent to commit the crime. The defendant made his general intent relevant by pleading not guilty. McCall acknowledged the conflict on admissibility of Rule 404(b) between the Fifth Circuit and other circuits when an offense involves general intent:

> "See United States v. Manganellis, 864 F.2d 528, 539 (7th Cir. 1988). Although other circuits disagree, and our approach has been criticized, we allow the admission of extrinsic offense evidence on the question of general intent. See Vivian M. Rodriguez, The Admissibility of Other Crimes, Wrongs or Acts Under the Intent Provision of Federal Rule of Evidence 404(b): The Weighing of Incremental Probity and

Unfair Prejudice, 48 U. MIAMI L.REV. 451, 460-67 & n.111 (1993)."

McCall, 553 F.3d 828, n.21.

The University of Miami Law Review, citing the Fifth Circuit cases of Beechum, supra, and Roberts supra, said:

> "... Apparently, the court in Roberts did not recognize the distinction between specific intent and general intent crimes. This same court in United States v. Adderly, 529 F.2d 1178, 1180 (5th Cir. 1976), noted that a conspiracy charge did not require proof of specific intent... The panel in Roberts was primarily concerned with the unique nature of conspiracy charges and the difficulties of proving intent when a defendant is accused of conspiring. Despite the court's reliance on Beechum, the court refused to adopt the policy suggested in Beechum of excluding other crimes evidence when intent was uncontested. Moreover, the Roberts court noted that the defendant's offer to not actively contest the issue of intent was insufficient because of the burden on the government to establish general intent."

Footnote 111 of Law Review article.

Edward Imwinkelried, 2 Uncharged Misconduct Evidence, § 8:10 (November, 2009), discusses whether a "material fact that uncharged misconduct is offered to prove is in genuine dispute." The treatise notes the theory of the Fifth Circuit and others:

> "The courts divide over the question of whether the material fact must be in genuine dispute to warrant the admission of uncharged misconduct. Some English and American courts take the position that the defendant's not guilty plea automatically creates sufficient prosecution need for uncharged misconduct. The prosecution has the burden of proving every element of the charged crime, and the not guilty plea "sufficiently raises" each element to permit proof of any element through uncharged misconduct. Several American jurisdictions flatly reject the requirement that the defense evidence creates an actual dispute over the material fact."

Footnote 14 cites United States v. Roberts, supra, for the proposition that "a few courts have concluded that Rule 404(b) repeals any case law requirement that the material fact be in real dispute."

The article then refers to the "majority view," which it deems the "better and prevailing ... view":

> "However, the better and prevailing English and American view is to the contrary. In England, the Thompson[1] decision established that the prosecution may not "credit the defendant with fancy defences." In light of Thompson, a bare not guilty plea is insufficient to allow the admission of uncharged misconduct. The prosecution must be able to "fairly" say that the defendant disputes the issues. Likewise, in the United States prior to the adoption of the Federal Rules of Evidence, "nearly every court of appeals" held that the material fact must actually be in dispute. The defendant must sharpen the relevance of the uncharged misconduct evidence by affirmatively contesting the material fact that the misconduct is offered to prove. In the courts' words, the issue must be actual, affirmatively contested, discrete, disputed, live, material, meaningful, real, or true. If it is unrealistic to assume that the

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[1] Thompson v. The King (1918) A.C. 221, 232-33

> defendant will contest the issue and the issue is only technically in dispute and not in substance, most courts exclude the prosecutions' uncharged misconduct. The potential issue is a mere phantom. The Wisconsin Judicial Council Committee Note to its of Rule 404(b) specifically states the issue must "substantially disputed.'"

Wright and Graham, 22 Federal Practice and Procedure, § 5242 (1st ed. 2010), carefully explains the "intent" exception to Rule 404(b) and points to numerous conflicts among the circuits as to its application. It states that "[a]ppellate courts sometimes take a casual attitude toward the requirement that the other crime be relevant to show intent...," (Footnote 2.1), and gives the proper use of "intent":

> "The theory upon which evidence of other crimes is admissible on these under Rule 404(b) is that its use on the mental element of the offense does not require an inference as to the character of the accused or as to his conduct. Many courts have failed to distinguish between the use of bad acts to prove intent as an ultimate issue and their use to prove intent to prove that defendant acted on his intent. Where the defendant admits the act but denies

> intent, Rule 404 does not exclude specific instances to prove or disprove intent even where this requires an inference as to the defendant's character because the character is not being used to support an inference to conduct. But where the jurors are to infer that because of his intent the defendant did certain acts he has denied, the evidence is offered to prove conduct and bad acts can only be used for this purpose if they prove the defendant's intent to commit the acts without the use of any inference as to his character."

In the accompanying footnote 11, the treatise, citing United States v. Lynn, 856 F.2d 430, 436 (1st Cir. 1988), said that "[t]he crux of the admissibility of evidence to prove intent under Rule 404(b) is that the jury must be able to infer intent without inferring that the defendant had bad character and therefore was likely to have intended to participate in the crime." The footnote is critical of the Fifth Circuit's view of the intent exception. Citing United States v. Barnes, 586 F.2d 1052, 1057-1058 (5th Cir. 1978), the treatise states that:

> "[T]his justification is stretched thin when evidence of a defendant's past drug dealings is admitted into evidence to show that the defendant intended to

> become a member of a conspiracy to smuggle drugs... Here the evidence was offered to prove conduct, albeit conduct that is partly mental in nature, and the line of reasoning looks suspiciously like proof of propensity.
>
> Footnote 11.1 refers to those courts, which have failed to distinguish "between the use of bad acts to prove intent as an ultimate issue and their use to prove intent to prove that defendant acted on his intent." Specifically relevant to the present petition is the treatise's citation of United States v. Rhodes, 779 F.2d 1019, 1031 (4th Cir. 1985), as evidence of such a failure. The footnote says that Rhodes admitted "convictions for possession of drugs to prove defendant intended to and therefore did participate in conspiracy to sell drugs.'"

Wright and Graham reject the Fifth Circuit's theory that the issue of intent is always relevant when the government is required to prove it:
Since most crimes have some mental element, it is not surprising that the intent exception is the one most frequently invoked to justify admission of other crimes evidence. Recognizing that the routine use of this exception could easily destroy the exclusionary rule, some courts have imposed additional

requirements for its use. The most common of these rules demands that intent be a "material issue" in the case. This means more than that intent must be an element of the crime charged. In the words of a leading case:[2]

> "[T]o justify admission into evidence of an accused's prior criminal acts to establish willfulness and intent, it is necessary that willfulness and intent be more than merely formal issues in the sense that the defendant is entitled to an instruction thereon... When, as in this case, the government has ample evidence to take the case to the trier of fact for its deliberation, a plea of not guilty cannot, by itself, be construed as raising such a keen dispute on the issue of willfulness and intent so as to justify admission of this type of evidence."

The issue of intent must be seriously disputed; for example, if the defendant claims that he is not the person identified as the actor, intent is not an issue and the exception cannot be invoked.

Footnote 24 has numerous cases, which basically state that Rule 404(b) evidence on intent is not admissible to prove intent when the defendant denies the act itself, and not the intent with which it

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[2] United States v. Frierson, 419 F.2d 1020, 1023 (7th Cir. 1977) (per Grant, J.)

was accomplished. The treatise, however, also refers to the "bizarre position" of the Fifth Circuit in United States v. Black, 595 F.2d 1116, 1117 (5th Cir. 1979), where the court held that when the defendant claimed that heroin found in his residence belonged to someone else, "the issue of intent is 'squarely in issue.'" In a bit of sarcasm, the treatise said that "[t]o those unschooled in the subtleties of the crime of possession with intent to distribute, it would seem that the issue was the defendant's possession, not his intent." In Footnote 24.1, the treatise again criticized the Fifth Circuit's use of the intent exception of Rule 404(b) in United States v. Smith, 726 F.2d 183, 185 (5th Cir. 1984):

> "One court has inexplicably found that intent was in issue and other crimes evidence particularly relevant where the sole defense was a denial that the charged sale had taken place... If the court thought that intent to sell could be used to prove that the sale took place, it has overlooked that this use requires an inference of conduct from propensity."

1 Handbook of Federal Evidence, § 404.5 (6th ed., 2009), contains numerous Advocacy Notes which discuss in detail the decisions of many courts on the intent element of Rule 404(b) or its state counterpart. The treatise states that the:

> "government can introduce evidence of another crime, wrong, or act during its case in chief unless either the parties have affirmatively taken the issue to which such evidence is relevant out of the case such as ... by the ... acceptance of a concession or stipulation, the evidence is relevant solely to the question of specific intent and specific intent is not an element of the offense charged, or the crime is one of general intent and such intent is clearly inferable from the act."

Under the section, Intent: admissible only if in dispute, the treatise cites Iqbal v. State, 805 N.E.2d 401, 406-07 (Ind. App. 2004), and its reliance on Wickizer v. State, 626 N.E.2d 795, 799 (Ind. 1993), which held that "the intent exception was available only when a defendant went beyond merely denying the charged culpability and affirmatively presented a claim of particular contrary intent."

As noted in United States v. McCall, supra, 553 F.3d at 828, n.21, there is a division among the circuits whether extrinsic evidence of intent are admissible under Rule 404(b) in general-intent crimes. Likewise, the circuits do not agree whether extrinsic evidence on intent is automatically admissible in specific-intent crimes. See footnotes 54-55, Wright and Graham. Footnote 42 discusses at length the Sixth Circuit cases of United States v. Bell, 516 F.3d 432 (6th Cir. 2008), and United States v. Johnson, 27 F.3d 1186 (6th Cir.

1994). In Johnson, the court looked at its prior decision in United States v. Ring, 513 F.2d 1001, 1007-08 (6th Cir. 1975), and commented:

> "In Ring, this circuit squarely rejected the rule that would allow the government to introduce other acts evidence simply to prove mens rea.... We recognize, as Judge McCree explained in Ring, that such an approach would emasculate Rule 404(b)'s general prohibition on character evidence and would permit the prosecution to impress the jury with highly prejudicial evidence of an accused's prior misconduct on the ground that intent was an element of the crime charged..."

Johnson, 27 F.3d at 1192. The court cited United States v. Schaffner, 771 F.2d 149, 153 (6th Cir. 1985), which concluded that "because intent could be inferred from the crime charged and the defendant 'did not assert a lack of intent as part of his defense,' intent was not an issue in that case." Johnson, 27 F.3d at 1192. The court found that the rule was different with regard to the element of specific intent:

> "... where the crime charge is one requiring specific intent, the prosecutor may use Rule 404(b) evidence to prove that the defendant acted with the

> specific intent notwithstanding any defense the defendant might raise."

Johnson, 27 F.3d at 1192. Even in cases involving specific intent, evidence of prior acts is not "automatically admissible ...," since the trial court has to determine whether the evidence is more substantially prejudicial than probative." Id.

While prior acts may be admissible in specific intent cases, the court in Bell said that:

> "[u]nless the past and present crime are related by being part of the same scheme of drug distribution or by having the same modus operandi, the fact that a defendant has intended to possess and distribute drugs in the past does not logically compel the conclusion that he presently intended to possess and distribute... Indeed, a person may be a distributor or drugs on one occasion, and a mere user on another. The only way to reach the conclusion that the person currently has the intent to possess and distribute based solely on evidence of unrelated prior convictions for drug distribution is by employing the very kind of reasoning - i.e., once a drug dealer, always a drug dealer - which 404(b) excludes. See Old Chief v. United States, 519 U.S. 172,

> 180-81, 117 S.Ct. 644, ... (1997). Thus, to be probative of a defendant's present intent to possess and distribute, his prior convictions for drug distribution must be related in some way to the present crime for which the defendant is on trial."

Bell, 516 F.3d at 443-44 (citation omitted).

Other circuits have agreed with the Sixth Circuit in cases involving the issue of general intent. The Second Circuit in United States v. Danzy, 594 F.2d 905, 914 (2nd Cir. 1979) said that "[p]roof of intent ... may be inferable from the act itself..." In footnote 10, Danzy states that "[i]f the crime requires only a general criminal intent, evidence of specific intent or knowledge may be unnecessary and inadmissible under Rule 404(b). See United States v. Benedetto, 571 F.2d 1246, 1249 (2nd Cir. 1978)." In United States v. Soundingsides, 820 F.2d 1232, 1237 (10th Cir. 1987), the court found that admission of a prior act in a case where the defendant denied committing the charged crime was prejudicial. The admission of the prior act "was error for the 'fundamental reason that intent was not a genuinely contested issue.' United States v. Ring, 513 F.2d 1001, 1007 (6th Cir. 1975); United States v. Shackleford, 738 F.2d 776, 781-782 (7th Cir. 1984). See also 1 Wharton's Criminal Evidence, § 431 (15th ed.) ('Where the requisite intent is presumed or inferred from proof of the criminal act itself, or

where the intent of the defendant is not in issue, evidence of other crimes is not admissible')."

The Seventh Circuit in United States v. Owens, 424 F.3d 649, 654 (7th Cir. 2005), quoting United States v. Brown, 34 F.3d 569, 573 (7th Cir. 1994), said that "[p]rior act evidence may be admitted 'as proof of an element of a crime, such as intent, if the act demonstrates how the defendant's behavior was purposeful rather than accidental.'" In the situation where the government is required to prove only general intent, "... evidence of prior bad acts shall not be admitted to prove such intent unless the government has reason to believe that the defendant will place it in issue." Owens, 424 F.3d at 654.

Judge Tjoflat, concurring in United States v. Matthews, 431 F.2d 1296, 1313 (11th Cir. 2005), recognized that the court correctly applied circuit precedent, but he wrote separately "to express [his] view that the circuit's doctrine with respect to admission of Rule 404(b) evidence in conspiracy cases has evolved into one that undermines Rule 404(b) itself and represents a perversion of the origins of the circuit's doctrine in this context." He attacked the presumption which has emerged from United States v. Roberts, 619 F.2d 379 (5th Cir. 1980); namely, that the intent to join a conspiracy is at issue regarding of whether the defendant contests such intent "and evidence of prior acts probative of that intent may therefore be admitted, unless the defendant affirmatively removes the issue of intent from the case." Matthews, 431 F.2d at 1315-16.

Judge Tjoflat believed that "the Roberts presumption has morphed into a categorical - relevancy doctrine that presumes that virtually all prior drug offenses are relevant and almost automatically admissible in all drug conspiracy cases (subject only to Rule 403)." Id., at 1310. The "fuzzy math" inherent in Roberts "serves to admit propensity evidence in the name of intent. The intent necessary to possess an illegal drug is not more relevant to the intent to either conspire to distribute illegal drugs or to distribute them than any other criminal act." Id.

The petitioner submits that there is another important issue herein which has divided the circuits; namely, whether evidence of prior drug possession may be admissible in cases involving drug distribution or other cases involving more than mere possession. The conflicting opinions were set out in United States v. Haywood, 280 F.3d 715 (6th Cir. 2002):

> "The inquiry thus shifts to whether the evidence of Haywood's December 1997 crack cocaine possession is probative of his intent to distribute crack cocaine on August 1, 1997. To determine if evidence of other acts is probative of intent, we look to whether the evidence relates to conduct that is "substantially similar and reasonably near in time" to the specific intent offense at issue. United States v. Blankenship, 775 F.2d 735, 739 (6th Cir.

1985).

We must first decide whether the evidence of Haywood's December 1997 crack cocaine possession is "substantially similar" to the offense at issue - possession of crack cocaine with intent to distribute. The dissent apparently believes that it is, relying on cases from the Fifth, Eighth, and Eleventh Circuits that have held that a defendant's possession of drugs for personal use is relevant to prove his intent to distribute drugs found in his possession on another occasion. United States v. Logan, 121 F.3d 1172, 1178 (8th Cir. 1997); United States v. Butler, 102 F.3d 1191, 1196 (11th Cir. 1997); United States v. Gadison, 8 F.3d 186, 192 (5th Cir. 1993).

But we are unable to discern a compelling rationale for this approach, which fails to recognize that "[a]cts related to the personal use of a controlled substance are of a wholly different order than acts involving the distribution of a controlled substance. One activity involves the personal abuse of narcotics, the other the implementation of a commercial activity for profit. United States v. Ono, 918 F.2d 1462, 1465 (9th Cir.

> 1990). Haywood's possession of a small quantify of crack cocaine for personal use on one occasion, in other words, sheds no light on whether he intended to distribute crack cocaine in his possession on another occasion nearly five months earlier. United States v. Monzon, 869 F.2d 338, 344 (7th Cir. 1989) (concluding that the defendant's prior possession of a small amount of marijuana was not probative of his intent to distribute cocaine, although any evidence of the defendant's past distribution of cocaine would be relevant to prove his intent); Enriguez v. United States, 314 F.2d 703, 717 (9th Cir. 1963) (holding that the admission of evidence regarding the defendants' prior use of marijuana to prove intent to distribute heroin resulted in an unfair trial)."

Haywood, 280 F.3d at 721.

In the present case, the Fifth Circuit permitted the government to introduce prior convictions of drug possession, aging 15 to 19 years old, as probative of the petitioner's intent to enter into a conspiracy to distribute cocaine or possess with the intent to distribute cocaine. The petitioner respectfully submits that the Fifth Circuit represents the minority view among the federal circuits on the application of the intent exception of

Rule 404(b), and its opinion in Harper directly conflicts with Sixth Circuit's opinions in Bell, Johnson, and Haywood. Several circuits have also rejected the Fifth Circuit's belief that the intent element is automatically at issue in a conspiracy case, and have held that intent is not a proper purpose of Rule 404(b) when the intent element is either inferable from the criminal act itself or when the defendant, as in this case, denies that he or she participated in a conspiracy.

The district court's error here was not harmless. Improperly admitted evidence under Rule 404(b) could cause the jury to convict the accused "not for his involvement in the offense at issue, but rather because he appeared to be a 'bad' guy." United States v. Bell, supra, 516 F.3d at 446. Contrary to the Fifth Circuit's holding, the trial court's limiting instructions were not sufficient to cure the prejudice herein. In its harmless-error analysis, Bell states that:

> "Our concern is not "with whether there was sufficient evidence on which [the defendant] could have been convicted without the evidence complained of, "but rather the "question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." DeSantis, 134 F.3d at 769[3] (quoting Fahy v. Connecticut, 375 U.S.

[3] United States v. DeSantis, 134 F.3d 760 (6th Cir. 1998).

> 86, 86, 84 S.Ct. 229 ... (1963); ... "We will presume that the district court's error was reversible unless we can say, 'with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.'" Haywood, 280 F.3d at 724[4] (quoting Kotteakos v. United States, 328 U.S. 750, 765 (66 S.Ct. 1239 ... (1946)."

Bell, 516 F.3d at 447. The court also noted that a curative instruction and "convincing" or "overwhelming" evidence could render an error harmless in some cases. Id.

The evidence against the petitioner in this case was not overwhelming to the point where the district court's error was harmless. The bulk of the government's evidence of the defendant's involvement in a conspiracy came from the testimony of the alleged accomplices, Frank Savage and Gerrardo Platas. Accomplices' testimony are "viewed with special suspicion" because of the "strong motivation to implicate the defendant and to exonerate himself, ..." Lee v. Illinois, 476 U.S. 530, 106 S.Ct. 2056, 2062 (1986). See Fratta v. Quarterman, 536 F.3d 485, 501 (5th Cir. 2008) (citing Lee).

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[4] United States v. Haywood, 280 F.3d 715 (6th Cir. 2002).

Although Agent York testified that he recognized the defendant's voice on the telephone with Frank Savage, he did not previously know the defendant, nor did he hear the defendant's voice in person until quite a while later when he went to interview the defendant in Memphis. Although a witness is entitled to give a lay opinion on a speaker's voice, York's opinion is rather dubious in light of the facts of this appeal. Certainly, a jury could have grave doubts about York's ability to make such a voice identification.

CONCLUSION

For the aforementioned reasons, pursuant to Rule 10.1, Rules of the Supreme Court, the petitioner, Brian Keith Harper, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

This the 12th day of July, 2010.

Respectfully submitted,
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APPENDIX

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REVISED April 13, 2010

United States Court of Appeals
Fifth Circuit
F I L E D
March 9, 2010
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-40140
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
BRIAN KEITH HARPER,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:07-CR-244-4

Before CLEMENT, PRADO, and ELROD, Circuit Judges.
PER CURIAM:*

Pursuant to 5th Cir.R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

This appeal arises from the district court's entry of a judgment of conviction and its imposition of sentence on Defendant-Appellant Brian Keith Harper for one count of conspiring to possess five or more kilograms of cocaine
with the intent to distribute in violation of 21 U.S.C. § 846 and 18 U.S.C. § 2.

For the following reasons, we affirm.

I. FACTUAL BACKGROUND

In November 2007, Drug Enforcement Administration (DEA) agents executed a search warrant at an apartment in Lewisville, Texas on suspicion
that it was being used to store illegal narcotics[1]. The search revealed several items associated with cocaine trafficking and led to the arrest of Codefendant Gerrardo Javier Platas-Rodriguez. When the DEA agents confronted Platas-Rodriguez, he agreed to cooperate with the investigation and informed the agents about a hidden compartment in the stairwell of the apartment. The agents recovered fifty-seven bricks of cocaine, each weighing approximately one kilogram; $33,000 in cash; a money counter; freezer bags; and wrapping

[1] As Harper appeals the denial of his motion for a judgment of acquittal, we view "'the evidence and the inferences therefrom in the light most favorable to the verdict.'" *UnitedStates v. Fuchs*, 467 F.3d 889, 904 (5th Cir. 2006) (quoting *United States v. Anderson*, 174 F.3d 515, 522 (5th Cir. 1999)).

materials from the compartment. Platas-Rodriguez told the agents that he had been hired to maintain the apartment as a stash house by Guadalupe Antonio Barrera, a friend in Mexico.

After Platas-Rodriguez informed the agents that another drug transaction was planned, the agents decided to conduct a controlled purchase using fake cocaine. At the agents' request, Platas-Rodriguez contacted Barrera, who informed him that an individual, later identified as Codefendant Orlando Leal Martinez, would come from Mexico to represent Barrera in the sale of a quantity of cocaine. On November 30, 2007, Martinez instructed Platas-Rodriguez to come to his hotel room early the next morning to await Barrera's instructions for completing the sale.

The next morning, Platas-Rodriguez and Martinez met at the apartment and then drove to an International House of Pancakes (IHOP) to meet the purchaser. The agents observed a dual-wheel pickup with Tennessee plates towing a trailer enter the parking lot and later identified the driver as Codefendant Frank Savage. Savage met briefly with Platas-Rodriguez and Martinez inside the IHOP before driving to a nearby hotel and checking in. Shortly afterwards, Savage returned to the IHOP and handed Martinez a piece of paper with his room number on it. Savage then drove back to the hotel, removed a suitcase containing $898,590 in cash from the trailer, and entered his room. Martinez also drove to the hotel and went to Savage's room with a suitcase containing the fake cocaine while Platas-

Rodriguez remained in the parking lot. At this point, the agents arrested all three individuals.

Soon after his arrest, Savage began cooperating with the investigation. He told the agents that the money had belonged to Harper and that he was supposed to take the drugs to Harper. After Savage agreed to try to contact Harper, the agents retrieved a cellular telephone that Harper had given to Savage. Harper soon called and asked Savage what was going on. Harper indicated that he had been in contact with the seller and had learned that the seller's representative was not returning phone calls. Agent Don York, the lead case agent, recorded four brief conversations between Savage and Harper.

During these conversations, Harper seemed to be concerned that something was amiss.

On December 13, 2007, Harper was arrested in Memphis, Tennessee. During an interview, Agent York asked Harper if he knew why the DEA agents were present. Harper responded that Savage was "putting [his] name out there about some dope that got hit." Harper admitted that he had previously sold marijuana and cocaine and that his current source of cocaine was a Hispanic man named "Red."

II. PROCEDURAL BACKGROUND

A grand jury indicted Harper, Martinez, Platas-Rodriguez, Savage, and Savage's girlfriend, Sharif Ellis, on one count of conspiring to possess five or more kilograms of cocaine with the intent to distribute in violation of 21 U.S.C. § 846 and 18 U.S.C. § 2. After Harper pleaded not guilty, but

before trial, the government notified Harper of its intent to introduce evidence of three extraneous offenses:

(1) Harper's 1989 arrest and guilty plea for the possession of a controlled substance, which resulted in three years of
probation;

(2) His 1990 arrest and guilty plea for the unlawful possession of a narcotic, which resulted in a $300 fine; and

(3) His 1993 arrest for drug distribution and guilty plea for the possession of crack cocaine, which resulted in a nine-year jail sentence.

Harper filed a motion in limine, requesting a hearing to determine the admissibility of this evidence under *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), which the district court granted. After the hearing, the court determined that the evidence was admissible. On the morning of trial, the district court denied Harper's motion for a continuance. The district court also denied Harper's motion to strike the jury panel or, in the alternative, to grant a continuance on the ground that the jury panel was not drawn from a fair cross-section of the community, in violation of the Sixth Amendment and Due Process Clause of the Fifth Amendment.

At trial, the prosecution introduced the recorded conversations between Savage and Harper through the testimony of Agent York, who identified the voice as Harper's based on his interview with Harper after his arrest in Memphis. Agent York also defined several code words used in these

conversations, which he had learned from his involvement with the investigation. At the completion of the trial, the jury found Harper guilty. The
district court denied Harper's motion for judgment of acquittal and sentenced him to thirty years of imprisonment, followed by ten years of supervised release.

III. DISCUSSION

We have jurisdiction under 28 U.S.C. § 1291. Harper appeals his conviction, arguing that several of the district court's evidentiary decisions were erroneous. Harper also contends that the district court should have granted his motions for a continuance and his motion to quash the jury panel. In addition, Harper argues that the district court committed several errors during voir dire and that it should have granted his motion for a judgment of acquittal.

A. Admissibility of Harper's Prior Offenses

We review a decision to admit evidence of prior offenses under Federal Rule of Evidence 404(b) using a heightened abuse of discretion standard. *United States v. McCall*, 553 F.3d 821, 827 (5th Cir. 2008). Pursuant to this standard, the evidence must be "'strictly relevant to the particular offense charged.'" *United States v. Jackson*, 339 F.3d 349, 354 (5th Cir. 2003) (quoting *United States v. Hays*, 872 F.2d 582, 587 (5th Cir. 1989)).

Rule 404(b) excludes evidence of extrinsic "bad acts" to prove a defendant's bad character. Fed. R.

Evid. 404(b). Such evidence may, however, be admissible "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* In *Beechum*, this court set forth a twostep test for determining whether extrinsic evidence is admissible. 582 F.2d at 911. Before a district court may admit extrinsic evidence of a prior offense, "it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of [Federal Rule of Evidence] 403." *Id.*

The government argues that the admission of the prior offenses satisfies the first prong of the *Beechum* test because Harper placed his intent at issue by pleading not guilty. This court permits the introduction of extrinsic evidence to prove criminal intent when a defendant enters a plea of not guilty, thereby requiring the government to prove the elements of its case[2]. *McCall*, 553 F.3d at 827–28. The crime with which Harper was charged, conspiracy to possess cocaine with the intent to

[2] During oral argument, Harper's counsel argued that the government was on notice that Harper was not placing his intent at issue because his defense was "centered around identity." While the opening statement of Harper's trial counsel did indeed focus primarily on the issue of identity, this falls far short of "'enforceable pre-trial assurances that he intend[ed] not to dispute criminal intent.'" *McCall*, 553 F.3d at 828 (alteration in original)(quoting *United States v. Webb*, 625 F.2d 709, 710 (5th Cir. 1980)).

distribute, required the government to prove that Harper had the intent to join the conspiracy. *United States v. Garcia Mendoza*, 587 F.3d 682, 689 (5th Cir. 2009). Evidence of Harper's past drug transactions is relevant to establish his criminal intent. *Id.* Therefore, the evidence of Harper's prior offenses satisfies the first requirement under *Beechum*.

The second prong of the *Beechum* test requires that the evidence meet the general requirements of Rule 403 and that its probative value not be substantially outweighed by its unduly prejudicial effect. This court has
"consistently . . . held that evidence of a defendant's prior conviction for a similar crime is more probative than prejudicial and that any prejudicial effect may be minimized by a proper jury instruction." *United States v. Taylor*, 210 F.3d 311, 318 (5th Cir. 2000). The record in this case reveals that the district court took great care to mitigate the prejudicial effect of the prior offenses. The district court limited the evidence to the judgment from each offense and Harper's stipulation as to the narcotic involved in each case. When the government introduced the evidence, the district court provided a detailed instruction to the jury as to the limited purposes for which the prior offenses were admitted. In its final instructions to the jury, the district court also gave the instruction regarding Rule 404(b) evidence found in the pattern jury instructions for the Fifth Circuit. *See* Fifth Circuit Pattern Jury Instructions (Criminal Cases) §

1.30 (West 2001). In light of our precedent and the district court's efforts to mitigate the prejudicial effect of the prior offenses, the district court did not abuse its discretion in admitting the extrinsic evidence. *See Garcia Mendoza*, 587 F.3d at 689.

Harper also argues, for the first time on appeal, that the government and the district court erroneously characterized two of his prior offenses. As these issues were not raised before the district court, we review for plain error only. *United States v. Jasso*, 587 F.3d 706, 709 (5th Cir. 2009). "This court finds plain error when: (1) there was an error; (2) the error was clear and obvious; and (3) the error affected the defendant's substantial rights." *Id.* (internal quotation marks and citations omitted). Harper argues that his 1989 offense was improperly characterized as a conviction when in fact it was a deferred adjudication. The government concedes the error, but emphasizes that the prosecution, district court, and defense counsel all made the same error and that the mischaracterization was not intentional. Harper presents no authority for the proposition that the use of the term "conviction" for his 1989 offense constitutes plain error. We hold that the mischaracterization did not affect Harper's substantial rights and was not plain error.

Harper maintains that his 1990 offense did not actually involve a conviction for a controlled substance. This argument lacks merit. Harper stipulated to the narcotic involved in the offense and

did not object when the judgment of conviction was presented to the jury with his stipulation. Moreover, the document admitted regarding Harper's 1990 offense indicates that he pleaded guilty to possession of cocaine. There was no error arising from the introduction of Harper's 1990 conviction.

B. Harper's Motion for a Continuance

Harper argues that the district court abused its discretion when it denied his oral motion for a continuance made on the first day of trial. This court reviews a district court's denial of a motion for continuance for an abuse of discretion that results in serious prejudice. *United States v. German,* 486 F.3d 849, 854 (5th Cir. 2007). "Factors we consider when determining whether a continuance was warranted are: the amount of time available for preparation; defendant's role in shortening the time needed; the likelihood of prejudice from denial; and the availability of discovery from the prosecution." *United States v. Messervey*, 317 F.3d 457, 462 (5th Cir. 2002) (citing *United States v. Uptain*, 531 F.2d 1281, 1286–87 (5th Cir. 1976)). At trial, Harper asserted three justifications for a continuance, each of which he reurges on appeal.

Harper first argues that a continuance was merited to allow him to retrieve potentially exculpatory recorded statements made by Savage[3].

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[3] Harper attempts to characterize this issue as a violation of the prosecution's obligation to disclose exculpatory information under *Brady v. Maryland*, 373 U.S. 83 (1963). However, he did not raise a *Brady* claim in the district court, and we do not

On the day before trial, Harper's attorney discovered that Savage had made calls from a state jail, which had been recorded by the phone company, that exculpated another codefendant. The phone company informed Harper's counsel that it could probably retrieve the recordings, but not without difficulty and some delay.

On the first day of trial, Harper's counsel presented the government with those recordings he had obtained. In response to the district court's inquiry, the government denied having possession of any other recordings. The district court ultimately rejected, without comment, Harper's argument that the need to obtain these other recordings merited a continuance.

Harper has failed to show that the district court's decision resulted in "serious prejudice." *German*, 486 F.3d at 854. The need to investigate an opposing witness's prior statements can justify a continuance if linked to specific evidence, but a "speculative argument" about "the possibility of additional inconsistent statements" is insufficient. *Id.* Harper's counsel had a year to investigate these statements before trial. This weighs against a finding of prejudice. *See Messervey*, 317 F.3d at 462. In addition, Harper had already requested and received four continuances. *See United States v. Walters*, 351 F.3d

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consider such claims when they are raised for the first time on appeal. *United States v. Skilling*, 554 F.3d 529, 568 n. 63 (5th Cir.), *cert. granted*, 130 S.Ct. 393 (2009).

159, 170 (5th Cir. 2003) (upholding denial of continuance to investigate exculpatory information where defendant had previously been granted two continuances). Moreover, Harper has failed to uncover exculpatory evidence since the denial of his motion. *See German*, 486 F.3d at 854 (observing that the defendants' inability to point to any newly discovered exculpatory evidence undercut their argument that the district court erred by denying their motion for a continuance). In light of these circumstances, the district court did not abuse its discretion when it denied Harper a continuance on this ground.

Harper next argues that a continuance was merited to allow him to retrieve evidence to rebut Platas-Rodriguez's testimony. Before trial, Harper told his attorney that Platas-Rodriguez could not identify him and therefore could not link him to the conspiracy. Two days before trial, Harper's counsel asked the prosecutors whether Platas-Rodriguez could identify Harper; they responded with uncertainty and told Harper's counsel that they would interview Platas-Rodriguez and respond at a later date. On the day before the trial, the prosecution informed Harper's counsel that Platas-Rodriguez could identify Harper because the two had met on three prior occasions, including once on a trip to Mexico. Harper argued that a continuance was necessary in order to obtain Harper's records of travel to Mexico. In response to this argument, the district court made the following factual findings:

> I don't find that there's any surprise here other than that you were never told for sure that [Platas-Rodriguez] would identify your client. But you were certainly never told that he wouldn't identify
> your client. So he's just like any other witness. And if you had wanted to confirm that, you could have done that earlier.

The district court then denied the motion for a continuance.

In light of these findings, we cannot say that the district court abused its discretion by denying the motion for a continuance on this ground. Harper has not demonstrated that he was unfairly surprised when the government revealed that Platas-Rodriguez could identify him. Consequently, he has not shown that the denial of his motion resulted in serious prejudice. *See German*, 486 F.3d at854; *Messervey*, 317 F.3d at 462.

Harper also asserts, for the first time on appeal, that the government's filing of a motion in limine on the day of trial merited a continuance. We reviewthis issue for plain error. *Jasso*, 587 F.3d at 709. Harper claims that the late filing left him unable to defend against the motion. At the time of the motion, however, Harper failed to indicate that he was unprepared to defend against it
and did not request a continuance on this basis. When the district court asked Harper's counsel if he "had a chance to look at" the motion, Harper's

counsel replied "Yes I have, Your Honor." Harper's counsel also stated that the motion for a continuance was a "totally separate issue" from the motion in limine. The district court did not commit plain error by not granting a continuance on this basis.[4]

C. Harper's Fair Cross-Section Claim

"The Sixth Amendment and the Due Process Clause of the Fifth Amendment require that a jury be drawn 'from a fair cross-section of the community.'" *United States v. Williams*, 264 F.3d 561, 567 (5th Cir. 2001) (quoting *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975)). Harper claims that these rights were violated because only two of the forty-six prospective jurors were African-American. In order to establish a prima facie violation of the fair cross-section requirement, Harper must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that

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[4]In his opening brief, Harper claims that he was prejudiced by the late arrival of the government's "Notice of Sentence Enhancement." We do not address this claim, as Harper has dedicated little more than one sentence to it and makes no specific argument as to why the notice caused him prejudice. *See Davis v. Maggio*, 706 F.2d 568, 571 (5th Cir. 1983) ("Claims not pressed on appeal are deemed abandoned.") (citation omitted); *cf. F.D.I.C. v. Mijalis*, 15 F.3d 1314, 1327 (5th Cir. 1994) ("[I]f a litigant desires to preserve an argument for appeal, the litigant must press and not merely intimate the argument during the proceedings before the district court.").

> the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Williams, 264 F.3d at 568 (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979)). If Harper makes out a prima facie case, the burden shifts to the government to demonstrate that attainment of a fair cross section is incompatible with a significant state interest. *Duren*, 439 U.S. at 368.

Harper challenges the district court's denial of his motion to strike the jury panel, arguing that he had presented a sufficient prima facie cross-section claim.

When a district court denies a defendant's motion to strike a jury panel, we review the district court's factual findings for clear error and its conclusions of law de novo. *United States v. Alix*, 86 F.3d 429, 434 (5th Cir. 1996). In this instance, the district court rejected Harper's claim after finding that he had failed to present "any evidence that this jury was selected by some method other than the jury plan that has been approved by [the United States District Court for the Eastern District of Texas] and the Fifth Circuit Judicial Council." The district court ruled that "[a]bsent some evidence that this panel was improperly chosen, the court is going to deny your motion to quash this panel and dismiss the panel."

We find no error in this holding. The district court correctly ruled that Harper had failed to establish a prima facie cross-section claim because he provided no evidence of the relationship between the representation of African-
Americans on the venire and the number of African-Americans in the relevant community. "[A] defendant cannot establish a prima facie violation of the faircross-
section requirement by relying solely on the composition of the jury panel at his own trial." *Alix*, 86 F.3d at 434 n.3 (citing *Timmel v. Phillips*, 799 F.2d 1083, 1086 (5th Cir. 1986)); *accord United States v. Olaniyi-Oke*, 199 F.3d 767,
773 (5th Cir. 1999). Instead, Harper must demonstrate that the percentage of African-Americans in the community differs from the composition of the venires
drawn from the judicial district. *See Williams*, 264 F.3d at 568–69 ("Absent evidence of the percentage of African-Americans in the community, we have no baseline against which to compare the composition of Defendant's venire."). On appeal, Harper again relies solely on the composition of his own panel to make his prima facie case. This is legally insufficient to meet the requirements of the
Duren test[5]. *Alix*, 86 F.3d at 434 n.3.

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[5] The same failure also defeats Harper's parallel Equal Protection claim alluded to in the briefing of his Sixth Amendment claim. *See United States v. McKinney*, 53 F.3d 664, 671 (5th Cir. 1995) ("The disparity between 2.28% eligible African-American population, and no

Harper also contends that even if he had failed to make a prima facie case,the district court should have granted him a continuance to allow him to research and brief the issue. We review this issue for abuse of discretion resulting in serious prejudice. *German*, 486 F.3d at 854. The district court does not appear to have addressed the request for a continuance apart from ruling on the merits, and the government does not address it in its brief. However, our prior decision in *Alix*, 86 F.3d at 435, is instructive. There, the defendant became suspicious of the venire's racial profile during jury selection and sought a continuance to investigate the racial makeup of the jurisdiction. *Id.* at 433–34. The district court denied the motion, and we affirmed, concluding that "[i]n lightof the district court's findings, and especially in light of [the defendant's] failure to present any evidence to the contrary, we hold that the district court did not abuse its discretion when it denied [the defendant's] motion for a continuance." *Id.* at 435. The district court in *Alix* made the following findings:

> I do not feel it's in the best interest of justice to grant the motion to
> have that type of delay in this trial. Again, while you may conduct those studies, surveys, or whatever, I am not convinced that they

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African Americans on the venire panel does not raise the inference that racial discrimination rather than chance produced the result." (citing *Alexander v. Louisiana*, 405 U.S. 625, 630(1972))).

> would indicate or prove that any of the irregularities that you are concerned with have actually happened or taken place. I am not convinced that, at least from my knowledge of the racial makeup of the Victoria Division that the Jury would be any different if we
> struck this panel and summoned a new panel. I think that we have selected these potential jurors in manner that has been used throughout the Southern District. I am not aware of any irregularities involved in that process.

Id. at 435 n.4. The district court in this case likewise made specific findings that Harper had failed to present any evidence that the jury was selected in a manner other than that which had been approved by the district court and the Fifth Circuit Judicial Council. And like the defendant in *Alix*, Harper has not identified any evidence that he might have been able to discover had the continuance been granted. Therefore, we hold that the district court did not abuse its discretion when it denied Harper's motion for a continuance.

D. Adequacy of the Voir Dire

We review challenges to the scope of voir dire proceedings under an abuse of discretion standard. *United States v. Munoz*, 150 F.3d 401, 412 (5th Cir. 1998). "The district court has broad discretion in determining how best to conduct voir dire and in deciding whether to excuse a juror," and "[a] court

abuses its discretion when the scope of voir dire is inadequate to discover bias and deprives the defendant of an opportunity to make reasonable use of peremptory challenges." *United States v. Greer*, 968 F.2d 433, 435 (5th Cir.1992) (en banc) (per curiam) (citations omitted). Harper challenges the district court's voir dire on two grounds. First, he argues that the district court abused its discretion by refusing his request to ask the veniremembers general questions about their education and their children. Second, Harper contends
that the district court allowed the prosecutor to mislead the jury during voir dire.

Harper submitted a proposed written voir dire questionnaire with several questions, including one that sought information regarding the veniremembers' level of education, and one that sought information regarding the sex, age, and occupation of the veniremembers' children. During a pretrial hearing, the district court voiced concern that the questions were "too personal" and "encouraged comparing jurors with each other." The district court stated that it "didn't want anybody to feel embarrassed who comes here for jury service." The district court later entered an order denying Harper's request to submit the questionnaire, noting that many of the questions in the questionnaire were customarily asked by the district court.

During voir dire, the district court permitted the parties to question individual members regarding personal matters, some of which involved the veniremembers' children. The district court

began by asking the members of the venire a set of nine basic questions. Afterwards, the parties were allowed to pose questions to the group, with follow-up questions for individual members of the venire. The examination explored the venire for bias, and elicited a free and open exchange between the venire, the district court, and counsel. The district court and the parties asked the members of the venire whether they knew anyone who had prior involvement with drugs or who worked in law enforcement. The district court and the parties also asked the veniremembers whether they knew anyone associated with the case and whether their personal beliefs would interfere with their impartiality. Harper challenged three prospective jurors for cause, all of which the district court granted. Harper did not object to the jury that was empaneled.

Under these facts, the district court did not abuse its discretion by denying Harper the opportunity to submit his proposed questionnaire. A district court's failure to ask a proposed question does not constitute an abuse of discretion if the overall voir dire examination and the instructions given at trial adequately protect a party's interests. *United States v. Harper*, 527 F.3d 396, 409–10 (5th Cir. 2008); *United States v. Williams*, 573 F.2d 284, 287 (5th Cir. 1978). The proper test is whether the district court's "inquiry reasonably assured that any bias or prejudice against [Harper] would have been discovered if present." *United States v. Quiroz-*

Hernandez, 48 F.3d 858, 869 (5th Cir. 1995). Having reviewed the record in this case, we are satisfied that this standard was met.

Harper next argues that the district court permitted the prosecutor to mislead the jury during voir dire. To the extent that Harper objected to the conduct of the voir dire, our review is for abuse of discretion. *Munoz*, 150 F.3d at 412. Alleged errors that were not preserved for review by a timely objection are reviewed for plain error. *United States v. Fambro*, 526 F.3d 836, 847 (5th Cir.), *cert. denied*, 129 S. Ct. 625 (2008). Harper's first objection came after the government described the crime of conspiracy as follows:

> A conspiracy is an illegal agreement. It's not violating the law, it's an agreement to violate the law. It's the defendant and one other person on one occasion entering into an agreement to break the law . . . The defendant has to enter into it voluntarily, willfully, with the intent to further the agreement.

Harper objected to this characterization, arguing that there must be "an [overt] act in furtherance of [the conspiracy]." This argument is without merit; conspiracy under 21 U.S.C. § 846 requires no overt act. *United States v. Shabani*, 513 U.S. 10, 11 (1994) ("This case asks us to consider whether 21 U.S.C. § 846, the drug conspiracy statute, requires the Government to prove that a conspirator committed an overt act in furtherance of the conspiracy. We conclude that it does not.").

Harper's second objection came when the prosecutor examined the members of the venire regarding testifying codefendants. Harper objected that the prosecutor's inquiry was "getting into the internal operating procedures of the United States Attorney's Office, committee meetings and things." The district court sustained that objection and limited the government's discussion of that topic. On appeal, Harper argues that this line of questioning also confused the venire to the point that the potential jurors were unable to understand that the government was referring to cooperating witnesses. This objection was never raised before the district court, however, and the district court did not commit plain error by allowing the inquiry after limiting its scope.

Other than these two objections, Harper presents only a running description of the proceedings without specific argument. By failing to adequately brief these issues, Harper has waived them. *United States v. Skilling*, 554 F.3d 529, 568 n.63 (5th Cir.), *cert. granted*, 130 S. Ct. 393 (2009).

E. Agent York's Testimony

Harper argues that the district court improperly admitted audio tapes of conversations between himself and Savage based on the testimony of Agent York, who recorded them. Harper also argues that the district court erred in permitting Agent York to testify about his understanding of the contents of the conversations. We review a district court's determination of the admissibility of evidence under a heightened abuse of discretion standard.

United States v. Yanez Sosa, 513 F.3d 194, 199–200 (5th Cir. 2008).

The admissibility of opinions by lay witnesses is governed by Federal Rule of Evidence 701, which provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

"Testimony by a witness that he recognized the accused by his voice is admissible, provided that the witness has some basis for comparison of the accused's voice with the voice which he has identified as that of the accused." *United States v. Ladd*, 527 F.2d 1341, 1343 (5th Cir. 1976) (citation omitted); *see also United States v. Lampton*, 158 F.3d 251, 259 (5th Cir. 1998) (holding that it was not an abuse of discretion for the district court to permit an FBI agent to identify the voice of the defendant based on prior personal contact with him).Once the basis for voice identification is established, it is up to the jury to decide whether the testimony is credible and how much weight to give it. *United States v. Mendoza*, 522 F.3d 482, 489 (5th Cir.), *cert. denied*, 129 S. Ct. 269 (2008).

Similarly, an agent may offer lay testimony of his opinions concerning the meaning of terms used by drug dealers if those opinions are based on his personal perceptions from the investigation. *See United States v. Miranda*, 248 F.3d 434, 441 (5th Cir. 2001) ("[The agent's] extensive participation in the investigation of this conspiracy . . . allowed him to form opinions concerning the meaning of certain code words used in this drug ring based on his personal perceptions."); *see also United States v. Rollins*, 544 F.3d 820, 831–32 (7th Cir. 2008) ("We find that the trial judge did not err in concluding that [the agent's] 'impressions' testimony was rationally based on his first-hand perception of the intercepted phone calls about which he testified as well as his personal, extensive experience with this particular drug investigation.").

The district court did not abuse its discretion by admitting the tapes of Harper's conversations with Savage through Agent York's testimony. Agent York's interview with Harper in Memphis provided him with a "basis for comparison of [Harper's] voice with the voice . . . he . . . identified as that of [Harper]." *Ladd*, 527 F.2d at 1343 (citation omitted). Agent York's impressions of the meanings of some of the terms in the recorded conversation were likewise properly admitted. Having served as the lead agent in the investigation, Agent York became familiar with the drug ring. He participated in the search at the apartment, interviewed Platas-Rodriguez, helped to set up the sting operation, and was interviewing Savage when the conversations with Harper were

recorded. This experience is sufficient to render his testimony admissible under Rule 701. *See Miranda*, 248 F.3d at 441.6.[6]

F. Prosecutor's Closing Argument

Harper's last argument focuses on allegedly improper comments made by the prosecutor during her closing argument. As Harper did not raise the issue of the prosecution's closing argument before the district court, our review of that issue is for plain error only. *United States v. Munoz*, 150 F.3d 401, 415 (5th Cir. 1998). We take a two-step approach in reviewing a charge of prosecutorial misconduct during closing argument. *Id.* at 414. We first decide whether the prosecutor made an improper remark. *Id.* (citation omitted). If a statement
was improper, we then consider whether it prejudiced the defendant's substantive rights. *Id.* at 415 (citation omitted). In making this determination, we assess "'(1) the magnitude of the statement's prejudice, (2) the effect of any cautionary instructions given, and (3) the strength of the evidence of the defendant's guilt.'" *Id.* at 415 (quoting *United States v. Tomblin*, 46 F.3d 1369,1389 (5th Cir.1995)).

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[6] Harper also argues that the district court permitted Agent York to render legal conclusions regarding two assets that were seized. Harper did not raise this objection at trial and Agent York's testimony conveyed facts rather than legal conclusions. The district court did not plainly err in admitting this testimony.

Harper claims that the prosecutor improperly commented on his postarrest silence during closing argument. It is the general rule that a prosecutor may not argue that a jury should infer a defendant's guilt from his post-arrest silence. *United States v. Rodriguez*, 260 F.3d 416, 420–21 (5th Cir. 2001) (citation omitted). In this instance, the prosecutor made the following statement regarding Harper's interview with Agent York:

> Again it's important what Brian Harper doesn't say at this point. "What do you mean? What load got knocked off? Why wouldn't he work with me? What load got knocked off." Never says that. Doesn't say anything. He says, "Maybe. He might keep working with me." An admission? Oh you bet. What you don't say is just as important as what you do say.

In *United States v. Laury*, we found that the prosecution had improperly used the defendant's post-arrest silence to impeach him. 985 F.2d 1293, 1303 (5th Cir. 1993). In that case, the defendant had made statements to the FBI, but did not mention his whereabouts at the time of the alleged robbery. *Id.* We held that the prosecution impermissibly used the defendant's statements on those unrelated issues to discredit his alibi. *Id.* We noted that although the defendant "did not remain completely silent following his arrest" the prosecutor did not have "unbridled freedom to impeach [him] by commenting

on what he did *not* say following his arrest." *Id.* at 1304 n.10.

Harper also contends that the prosecutor improperly vouched for the credibility of certain trial witnesses. "[A] personal assertion by a prosecutor of a government witness's credibility is impermissible." *United States v. Gracia*, 522 F.3d 597, 601 (5th Cir. 2008) (citation omitted). Harper points to seven statements made by the prosecution that he alleges improperly bolstered the credibility of certain witnesses for the government. The first two statements occurred while the prosecutor argued to the jury that Savage had been truthful. The prosecutor asked the jury to "imagine the fear and panic" experienced by Savage at the moment of his arrest and then infer that Savage was "going to the tell the truth." The prosecutor then argued that it would be "quite a sophisticated lie on Frank Savage's part" to falsely implicate Harper "within an hour of his very stressful arrest" and asserted that the jury should infer that Savage was "telling the truth." The third statement was made while the prosecutor was explaining that Savage had honestly told the agents that a particular photograph did not depict Harper. The prosecutor observed: "Frank Savage, just like he has all along, told the truth and he said, '[n]o that is not [Harper].'" These statements give us some pause, as they could be read as "personal assertion[s]" of Savage's credibility. *Gracia*, 522 F.3d at 601.

The fourth, fifth, and sixth statements make up a large part of the prosecution's argument that

the testimony of Platas-Rodriguez was consistent with Savage's testimony and we do not recite them in their entirety. Having reviewed the entire exchange, however, we conclude that the prosecutor's arguments highlighted the consistencies between Platas-Rodriguez's and Savage's testimony, and urged the jury to infer that both men were being truthful. "[A] prosecutor may recite to the jury those inferences and conclusions [she] wishes them to draw from the evidence so long as those inferences are grounded upon the evidence." *United States v. Loney*, 959 F.2d 1332, 1343 (5th Cir. 1992).

The seventh comment was made as part of the prosecution's rebuttal argument. Harper's counsel had previously argued to the jury that the government had been dilatory in interviewing Savage and playing the recorded conversations for him. The prosecution responded:

> [i]n terms of when to interview the witnesses and when to investigate the case, if we talked to the witnesses five or six times, imagine what the flip-side of that argument would be . . . . The flipside of the argument would be that we were over there coaching him. We weren't. We asked them to tell us the truth, and that is what they told us.

We are somewhat troubled by the prosecutor's use of the first-person pronoun. This statement arguably suggests that the prosecutor had additional

knowledge that Savage was telling the truth based on her out-of-court interactions with him.

Even if we conclude that some of the prosecutor's comments "fell beyond the bounds of permissible behavior," they did not prejudice Harper's substantive rights. *Munoz*, 150 F.3d at 415. The district court instructed the jury immediately before closing argument that "any statements, objections, or arguments made by the lawyers are not evidence." This cautionary instruction mitigated any prejudicial effect of the prosecutor's comments. *See id.* (citing *United States v. Lokey*, 945 F.2d 825, 837 (5th Cir. 1991)). As Harper has failed to demonstrate prejudice to his substantial rights, he cannot obtain relief under the plain error standard. *United States v. Pillado-Chaparro*, 543 F.3d 202, 205 (5th Cir. 2008).

For the foregoing reasons, the judgment of the district court is hereby AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-40140

UNITED STATES OF AMERICA,
Plaintiff -Appellee
v.
BRIAN KEITH HARPER,
Defendant -Appellant.

Appeal from the United States District Court for the Eastern District of Texas, Sherman

ON PETITION FOR REHEARING EN BANC

(Opinion _____,5Cir.,_____,_____ F.3d _____)

Before Circuit Judges.

PER CURIAM:

(√)Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P.and 5TH CIR.R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED..The court having been polled at the request of one ofthe members ofthe court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P.and 5TH CIR. R; 35), the Petition for Rehearing En Bancis DENIED.

/s/_____
United States Circuit Judge

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Supreme Court
OCT 29 2010
OFFICE OF THE CLERK

NO. 10-65

IN THE SUPREME COURT OF THE UNITED STATES

BRIAN KEITH HARPER,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

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GROUNDS FOR REHEARING

Petitioner stands humbly before you, arms waving in the air. With all due respect, what we have here is a failure to communicate. 58 seconds into listening to Exhibit 19[1] in this case, and you would understand completely why it is impossible to make a voice identification from this push-to-talk Nextel (it is ***not*** a cell phone; it is a radio-band "burner"). Why this distinction matters is the snagged thread that unravels the entire case. This identification-testimony was the lynchpin of the case. If the prosecution had a valid case against this Petitioner, they would not have put an agent on the stand to make a last-minute ID from an indecipherable tape-recorded contact. The appellate court gave no indication of a familiarity with the sounds on the Exhibit 19[2].

There is chaos in the Circuits on the admission of layperson testimony under Fed. Rules of Evidence Sec. 701 ("FRE 701"). This Honorable Court has supervisory authority over the federal courts to prescribe binding rules of evidence and

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[1] Unless otherwise specified, all exhibits, page numbers and line numbers refer to the trial court evidence and transcript.

[2] The contacts (erroneously referred to as "phone conversations") lasted the following minutes and seconds: 2.44, 1.28, 1.27, 1.19. The responses by the call-recipient can be heard in sporadic one-second blasts of static, or not at all. But the call-recipient's "voice" per se, is *never* heard.

procedure. Carlisle v. United States, 517 U. S. 416, 426. This matter contains an issue of great importance to all the Circuits much the same as Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999) did with regard to FRE 702.

THE FACTS

The simplified fact scenario is a drug distribution ring busted and several individuals caught in the act; one of whom made four brief DEA-arranged "phone calls" (sic) to the alleged major-player distributor which were audio-taped.

During the 4 push-to-talk Nextel contacts, the indecipherable words of the call-recipient-speaker can be heard in one-second blasts of static.

The deal-making arrestee offered up Petitioner's name to go along with the one-second blasts of static, which name the agent quickly researched[3] and which resulted in this Petitioner's arrest two weeks later in Tennessee[4].

The Petitioner was then interviewed by Agent York who had overheard the terse push-to-talk contacts. Petitioner's home and business were searched from which no incriminating evidence was

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[3]The testimony at issue was not offered nor admitted under FRE 901(b)(5), nor did the appellate court make reference to that code section. Thus, for purposes of Petitioner's Rehearing request, that code section is not discussed.

[4]Testimony of Agent York: Page 313 lines 8 to 13 "Q. Now after these phone calls, interactions between Brian Keith

found.

There was no mention of any phone-voice identification, and the caller- recipient's matching push-to-talk Nextel was never recovered.

The photograph of an unknown individual was kept in evidence for a year apparently thought to be the Petitioner or the distributor that spoke on the push-to-talk Nextel[5].

The deal-making conspirator's credibility became severely questioned in the case[6] (he was unable to identify the petitioner) and suddenly the DEA agent was called upon to identify Petitioner based on the push-to-talk Nextel static[7].

THE MISUNDERSTANDING

There was a fundamental misunderstanding of the evidence in the appellate court's ruling. The term "cell phone" has been used to describe the technologically inferior push-to-talk Nextel walkie-talkie as though they are the same or even similar technology. They are not. Only through listening to

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[5] Page 356 line 15 to 357 line 21 for one example.

[6]Page 10 of the appellate court's decision, "On the day before trial, Harper's attorney discovered that Savage had made calls from a state jail, which had been recorded by the phone company, that exculpated another codefendant."

[7] Agent York testified repeatedly to the accuracy of the sounds/static on the tape-recording and the lack of any attempt to clean up the audio i.e., page 358 line 13 to 359 line 19.

Exhibit 19 can you understand the difference. The appellate court repeatedly used the term "cellular phone" and clearly understood it to be such. It was not. **Other than using the misleading words, "cell phone," and "phone call" we don't have words in English to accurately portray this Nextel object and these radio transmissions.**

The written transcript leads to the false impression that Exhibit 19 contains a normal everyday tape recording of a cell phone conversation. And this is obviously what the Fifth Circuit understood from the natural meaning of the words from the transcript[8]. But anyone who has been in the military, in a police unit or played with a walkie-talkie as a child would recognize the type of "blast of static" that takes the form of a word to be deciphered. But it is ***not*** a "voice" per se on the other end of the walkie-talkie Nextel.

A year after the arrest, at the jury trial, Agent York was suddenly used to testify that he identified the Petitioner's voice at the in-person interview two weeks after the push-to-talk Nextel contacts were made. The testimony is not just improbable, it is impossible. There is no way to understand this impossibility without listening to the actual Exhibit 19 (as opposed to just reading the agent's personal transcripts marked Exhibits 20 to 23).

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[8] In the appellate court's rendition of the facts, they stated, "After Savage agreed to try to contact Harper, the agents retrieved a ***cellular telephone*** that Harper had given to Savage..." (emphasis added)

The appellate court rendered a ruling upholding admissibility of the recording and voice identification based on the natural misunderstanding of the modes of communication. The push-to-talk Nextel is not a cell phone (in the movies/TV, it is perhaps called a "burner" --a throwaway inferior one-signal radio-type object) and you don't dial a phone number, you push a button to buzz the single party connected to the matching device. Please see page 310 Line 24 to 311 line 1 to 5 as well. (A Nextel representative testified beginning at page 460, line 22.)

The first 58 seconds[9] of Exhibit 19 from the trial court shows the identification was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Roper v. Beto, 454 F. 2d 499, 502 (5th cir. 1972) (quoting Simmons v. United States, 390 U.S. 377, 384 (1968).

This would not have happened if the trial court had been required to exercise discretion on the record rather than just admitting the evidence automatically.

MISJUDGING DISCRETION

The trial court & appellate court each ruled that the testimony was properly admitted as layperson opinion under FRE 701, but even if it were

[9]The use of the "58 seconds" is not to mislead the Court, but to accentuate that in less than a minute, one could understand the decisive issue here.

true that a layperson is *permitted* to testify to voice identification, that should never be interpreted as meaning that he *should* or *must*. It is clear from the record that the trial judge believed he had no choice -- that if it was offered as layperson opinion, the judge *must* allow it to go to the weight, not the admissibility.

The appellate court's ruling on this issue likewise referenced only the general proposition that a person ***can*** make an ID from a 'phone call' therefore they found no abuse of discretion. These "gatekeeper" issues cross-over in small part with the issues determinative in Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999) (granting certiorari to clarify trial judge's "gate-keeping" obligation regarding expert testimony under Fre 702--courts of appeals are to apply 'abuse of discretion' standard when reviewing district court's reliability determination.) Upon listening to the recording (Exhibit 19), it is clear the District Court's decision in this case, to admit layperson ID-testimony, was an abuse of discretion and therefore unlawful and a denial of due process.

The appellate court completely overlooked whether admissibility was appropriate under *these* facts--which is ***not*** to say this issue is fact-specific, because the 'gatekeeper' use of discretion should be **a universal rule**.

The agent translated the "drug code words" in this case not just because of the meaning of the words, but because *no person could have identified the words of static to begin with*. Yet this issue goes

one important giant step further -- not just a.) translation of the words that were formed, or b.) the meaning of the words, but whether you could hear c.) a "***voice***" to be identified with a human.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence" as reiterated in United States v. Gonzalez-Lopez, 548 U.S. 140 (2006). When a trial court rules that admissibility is "automatic" (by refusing objections as going to the "weight of the evidence, not the admissibility") it deprives the Petitioner of the right to have his attorney argue a legitimate point of law, thus essentially depriving Petitioner of the right to an attorney's argument and representation in court.

OPINIONS ARE FACTS, AND EXPLOITED

The agent's testimony of the push-to-talk contacts was allowed over objection, it was promised to be an opinion, but the testimony was stated as a fact and the opinion was abused. Just two examples, page 296 line 13 to 15: "I recognized the voice when I spoke with him...as being the same voice that was on that recorded telephone call that Mr. Savage made..." (It's stated as a 'fact.') And, page 310 line 22 & 23 Agent York: "it's my opinion Mr. Harper is a seasoned experienced drug-trafficker." (This is poisoning of the jury.) Minutes later the 'fact' was reinforced by the agent's testimony that a judge had forfeited Petitioner's property because Petitioner was

in fact the culprit. (Please see Page 316 lines 16 to page 317 line 3.) Further usurping the jury's role[10] in this case. United States v. Sanchez-Sotelo, 8 F3d 202 (5th Cir 1993)--an officer may not "translate" taped conversations where the officer's opinion went well beyond the plain meaning of the tape; Rule 701 should be applied in a manner that *allows the jury to draw it's own conclusions.* But this is not how it works in practice without a universal rule from this Supreme Court requiring use of the trial court's discretion. (Here, the prosecutor later bolstered the layperson-agent's "expertness" in the area of "phone"-voice identification and the agent was inexplicably deemed an expert on reading computer screens at page 615.) Holding in conflict, United States v. Vega, 860 F2d 779 (CA7 1989); 27 Fed Rules Evid Serv 561. The United States v. Figueroa-Lopez 125 F3d 1241 (9th Cir 1997) court noted the dangers of the government's blurring the line between expert & lay witnesses.

RULING WITHOUT DETAILS

When the appellate court ruled on the FRE 701 issue[11], they did not indicate a familiarity with

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[10]Page 380 at lines 1 to 4, another of many examples of usurping, where Agent York told the jury, "I believe I've done the best possible job that I know how. I've collected all the evidence that I feel is sufficient to what I feel prove Mr. Harper guilty of this crime. I feel like I've done the best job I can do." The record is silent as to any emotion in his voice.

[11] The end of page 22 and page 23 of the unpublished Opinion of the Court of Appeals for the Fifth Circuit in United States v.

the 'phone' call in *this* case (perhaps relying solely on the trial transcript and Exhibits 20 to 23, the agent's written rendition). Listening to less than a minute of the CD would make it clear that the positive-ID testimony is wishful thinking and irreparably prejudicial so that it should not have been permitted. (There's a reason why the agent transcribed the tapes himself -- page Page 301 lines 22 & 23--no secretary or assistant could have understood it.)

Not only did the appellate court misapprehend the evidence, but the trial court ruled on the admissibility prior to ever hearing the recording. On page 300 at line 25 of the transcript, *the court explicitly indicates that no "judge's discretion" is involved* -- "Okay, your objection is overruled. I think it goes to the weight, not the admissibility...." The trial judge knew absolutely nothing about the sounds on the tape when this ruling was announced. This record is rife with issues upon which to render a ruling helpful and instructive to all Circuits. More importantly for Petitioner (and intriguing for the reader) the record itself suggests who the true culprit may have been--but clearly, the record does not support a conviction of the man imprisoned from these facts.

COMPOUNDING ERRORS

The appellate court stated that the prosecutor's words "give us some pause" and "We are

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Harper, 2010 WL 816836 (5th Cir., 3/9/10) Before Clement, Prado and Elrod, Circuit Judges.)

somewhat troubled by the prosecutor's use..." The appellate court's conclusion that even if the prosecutor used impermissible behavior it wasn't prejudicial *rests on a false premise.* That false premise being that the ID is valid and admissible, when in fact, the ID is unsustainable.

The prosecutor admonished the judge in front of the jury, "...but I just note for the court that there is case law that supports lay-witness identification of voice and that this is perfectly admissible, as the court has ruled." If she is referring to the two cases cited by the appellate court[12], one case had thousands of recordings and the other case had video/audio tapes--and both had to do with *telephones.* They could not be more distinguishable from the facts at hand in this case. (Not to mention the prejudicial effect that her mini-lecture to the court had on the jury.)

The appellate court was silent on the sufficiency of the evidence in this case. The Fifth Circuit made the statement that there are 3 points to assess in determining whether the prosecutor's improper statements were prejudicial. The third of these points would have been "the strength of the evidence of the Petitioner's guilt.[13]" The court

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[12]United States v. Ladd, 527 F.2d 1341, 1343 (5th Cir. 1976); United States v. Lampton, 158 F.3d 251, 259 (5th Cir. 1998)

[13]Page 24 of the appellate court's decision: "and (3) the strength of the evidence of the defendant's guilt. *Id.* at 415 (quoting United States v. Tomblin, 46 F.3d 1369,1389 (5th Cir. 1995))." But they remained silent on this third prong even after finding potential prejudice.

analyzed their first two points and concluded without any reference to the third. The fact that the court never referenced the sufficiency, quality or strength of the evidence against Petitioner speaks volumes. This indicates the substantial nature of the grounds for Rehearing[14].

If this Honorable Court were to grant the rehearing there is no possibility of regret because of the number, and significance, of issues to *all* the circuits (and the impact on this cruel conviction).
The record gives clues as to the true culprit. On the audiotapes, the deal-making arrestee repeatedly called the call-recipient "cuz," though when you listen, the name sounds more like "cul" (you can hear the arrestee's side of the call, you just can't hear the unidentified call-recipient). There are continual references in the case to "Malcolm." There was an 'erroneous' photo in evidence for a year. Had counsel been allowed to obtain more prison-phone-call recordings as requested, we may have heard the deal-making inmate referring to one particular caller as "cuz" or "cul." In that event, we would know without a doubt that the wrong man has been convicted.

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[14]The entire body of evidence consists of: the doubtful ID by the two impeached and deal-making inmates, chronic references to prior convictions, the prosecutor's sarcasm and the baffling opinion of the agent. That's it---that was the entire case. Why then the conviction? Both the agent and the prosecutor vouched for the guilt of the defendant and for the veracity of the two deal-making conspirators---to the jury(!)But this Petition for Rehearing will address the singular issue pursuant to Rule 44.

This conviction was based on non-credible inmate testimony, incredible agent testimony and intentional abuse of prior convictions. The culmination of this conviction-campaign ended with the prosecution's desired verdict but an opportunistic perfidiousness to evidence.

One criteria governing the exercise of discretion in granting or denying certiorari is whether the jury function in passing on disputed questions of fact and in drawing inferences from proven fact has been disrespected because they were misled, caused to believe their decision had already been made for them and repeatedly led to believe there was incriminating evidence outside their presence. Marshall v. United States, 360 U.S. 310 (1959) jurors so prejudiced as to warrant the exercise of this Court's supervisory power.

If this had been a trial for the murder of John Doe, and John Doe walked into the courtroom, the jury still would have convicted Petitioner for homicide---it was that prejudicial from beginning to end.

CONCLUSION

For the reasons stated above-- the colossal misunderstanding of, and prejudicial effect of, the "phone call" (sic) exhibit admitted into evidence, Petitioner respectfully requests this Honorable Court grant the Petition for Rehearing and address the issues which prejudicially poisoned the jury against the Petitioner in the trial below. Here, the

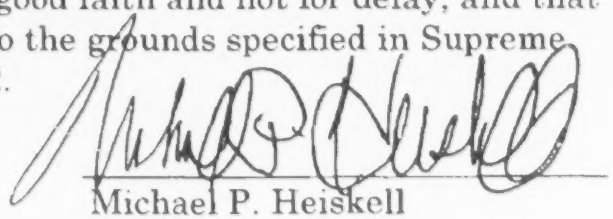
benefits of providing guidance concerning the proper application of FRE Sec. 701 justifies this Court's time on this case (just as *Kumho* justified the Court's time on FRE Sec. 702). We need a universal rule requiring *express* use of discretion when admitting layperson opinion.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.



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